## SIN KHENG CHUAN & ANOR v. SIN KHENG HOOI

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
BADARIAH SAHAMID JCA
MARY LIM JCA
[CIVIL APPEAL NO: P-02(NCVC)-(W)-1378-08-2016]
14 MARCH 2019

***TRUSTS:*** *Trustees – Breach of trust – Breach of fiduciary duties – Whether sole trustee of trust breached fiduciary duties as trustee – Whether sole trustee appropriated entire proceeds of disposal of shares – Whether trustee obtained unjust enrichment – Whether trustee exerted undue influence on plaintiff in signing settlement agreement – Whether there was misrepresentation by trustee on true value of shares – Whether share sale transaction unjust – Whether settlement agreement void and unenforceable*

***TRUSTS:*** *Constructive trust – Liability – Liability of constructive trustee – Whether constructive trustee had access to all records – Whether constructive trustee a fiduciary of plaintiff's shares – Whether there was disposition of plaintiff's share of proceeds of sale of trust shares in breach of trust obtained by unconscionable conduct of sole trustee and constructive trustee – Whether constructive trustee liable*

This was an appeal against the decision of the trial judge allowing the plaintiff's claim against the defendants in respect of 75,075 trust shares in Sin Kean Boon Capital Sdn Bhd ('SKBC'). The plaintiff and the first defendant were brothers while the second defendant was the wife of the first defendant. The first defendant was the registered proprietor of 99% of the shares in SKBC and the plaintiff was the registered proprietor of the remaining 1% of the shares in SKBC. The first defendant and the plaintiff were two directors of SKBC. However, the plaintiff was asked to resign as director and the second defendant was appointed as director in his place. On 3 December 1994, a trust ('the said trust') was made by the late Sin Kean Boon together with the first defendant as original trustees of the said trust for the benefit of the plaintiff and the plaintiff's children. On the demise of Sin Kean Boon, the first defendant became the sole trustee of the said trust. The said trust consisted of 75,075 ordinary shares of RM1 each in SKBC. The trust was valid for 20 years commencing from 3 December 1994 until 3 December 2014. According to the terms of the said trust, the funds of the said trust were for the benefit of the beneficiaries of the said trust *ie* the plaintiff and the plaintiff's children. On 30 November 2010, the plaintiff filed an action against the defendants. Subsequently, the parties negotiated and the suit was

withdrawn when parties entered into a settlement agreement. A sum of RM1.38 million was paid to the plaintiff in full and final settlement of disputes between the parties in respect of the said trust and the said civil action. Before the High Court, the plaintiff's claim against the first defendant was primarily for breach of fiduciary duties as a trustee of the said trust, in particular, in obtaining undue benefit from the proceeds of the same. The plaintiff's claim against the second defendant was premised on a breach of fiduciary duties as a constructive trustee of the said trust. The High Court found that (i) the first defendant as sole trustee of the said trust had breached his fiduciary duties as trustee and had obtained unjust enrichment from the said trust; (ii) the settlement agreement between the first defendant and the plaintiff was void and unenforceable on the grounds that the first defendant as sole trustee of the said trust had exercised coercion and undue influence in the administration of SKBC and the plaintiff's 75,075 trust shares; (iii) the first defendant had made a misrepresentation in cl. 1(iii)(b) of the settlement agreement that the amount stated therein was the amount in the audited accounts of SKBC for the year 1995; (iv) the settlement agreement was void and unenforceable; and (v) the second defendant was liable as a constructive trustee in respect of the plaintiff's trust shares of 75,075 shares of SKBC. Dissatisfied with the High Court's decision, the first and second defendants appealed.

**Held (dismissing appeal)**

**Per Badariah Sahamid JCA delivering the judgment of the court:**

**(1)** The plaintiff and the second defendant had entered into a sale and purchase agreement in respect of the 75,075 shares of SKBC which comprised the assets in the said trust of which the first defendant was the sole trustee. The first defendant had purchased the plaintiff's 75,075 shares for RM1.5 million, which was far below its market value. According to documentary evidence, between 8 January 1996 to August 1999, a total of 6,319,943 shares in the SKB Group owned by SKBC was sold by the first defendant for a sum of RM29,531,146.20. As a result thereof, the plaintiff was entitled to the sale proceeds to the extent of his 75,075 shares. In addition, 24.5% of SKBC shares were sold in 1998. This was the main investment for the 75,075 trust shares of the plaintiff in SKBC. The plaintiff was not informed of this disposal. The first defendant had appropriated the entire proceeds of the said disposal of shares in the sum of RM29,531,146.20. The first defendant had not deposited the plaintiff's portion of the proceeds of the said disposal in any trust account. Hence, the first defendant had breached his fiduciary duty as trustee to the said trust. (paras 20-23 & 26)

**(2)** The first defendant had also obtained an unjust enrichment in the form of sale proceeds from the disposal of the plaintiff's portion of SKBC shares which the trial judge calculated to be in the sum of RM9,567,621.70. The first defendant was the proper party against which the plaintiff had brought this action as the first defendant was the sole trustee of the said trust and the plaintiff's cause of action against the first defendant was for a breach of fiduciary duty and unjust enrichment by the misappropriation of the proceeds of the disposal of the plaintiff's 75,075 shares in SKBC. Thus, the first defendant's contention that in the circumstances the proper suit was by way of derivative action commenced by SKBC was misconceived. (paras 26 & 27)

**(3)** There was credible and cogent evidence to support the trial judge's findings that the first defendant who was in a dominant position to the plaintiff, had exerted undue influence on the plaintiff in signing the settlement agreement. The first defendant, being the sole trustee of the said trust, was indisputably in a fiduciary relation to the plaintiff. The circumstances surrounding the settlement agreement were such as to place the plaintiff at a disadvantage. The plaintiff had not understood the contents of the settlement agreement as the same was not explained to him by SD3. This was exacerbated by a most unusual clause which effectively precluded the plaintiff from the benefit of independent legal advice. Coupled with this was SD3's testimony that the settlement agreement was prepared entirely on the instructions of the first defendant. Thus, the trial judge's finding that there was undue influence emanating from the first defendant to induce the plaintiff to sign the settlement agreement was neither perverse nor plainly wrong so as to warrant appellate intervention. (paras 40 & 41)

**(4)** The amount owing by the first defendant was RM40,939,688 which comprised the proceeds of the share sale of SKBC in the SKB Group. The plaintiff was not informed when he signed the share sale agreement where the sale price was RM1.5 million. Neither was the plaintiff informed that the first defendant had appropriated the entire proceeds of the share sale transaction. There was a misrepresentation by the first defendant to the plaintiff on the true value of his shares. Had the plaintiff known that the true value of his shares was in excess of RM13 million, it was inconceivable that he would have agreed to accept the paltry sum of RM1,380,000 in the settlement agreement. Thus, there was a misrepresentation by the first defendant to the plaintiff that had induced the plaintiff to sign the settlement agreement. The share sale transaction between the plaintiff and the first defendant was therefore unjust. The

first defendant had exerted undue influence on the plaintiff and utilised his position as the sole trustee of the said trust to unjustly enrich himself. Thus, the settlement agreement was void and unenforceable. (paras 45-47)

**(5)** The second defendant was the wife of the first defendant, who was the sole trustee of the said trust as well as the registered proprietor of 99% of the shares of SKBC. The second defendant admitted that at all material times, she was aware that 75,075 shares in SKBC were the subject of the said trust in favour of the plaintiff and his children for 20 years. The evidence from the first and second defendants were that a sum of RM40,939,688 was taken out of SKBC by the first defendant as a loan to himself as a director of SKBC. This sum comprised the entire proceeds of the sale of SKBC's shares, which also included the plaintiff's trust shares. In their testimonies, the first and second defendants had alleged that the RM40,903,577 had been written off as 'bad debts' on the advice of their tax agent, who was never called to confirm this piece of crucial evidence. In any event, s. 133 of the Companies Act 1965 prohibits a company from giving loans to its directors. Thus, the loan of RM40,903,577 to the first defendant was in contravention of the said section. (paras 50, 52, 54 & 55)

**(6)** As a director of SKBC, the second defendant had access to all the records of SKBC as well as knowledge of the loan to the first defendant, the amount of which comprised the plaintiff's portion of 75,075 trust shares. Thus, the second defendant was the constructive trustee of the 75,075 trust shares of the plaintiff. The second defendant was a fiduciary of SKBC shares which included the plaintiff's shares. There had been a disposition of the plaintiff's share of the proceeds of sale of the trust shares in breach of trust and this was obtained by the unconscionable conduct of the first and second defendants. Thus, this court affirmed the decision of the trial judge in respect of the liability of the second defendant as a constructive trustee to the said trust. (paras 56 & 58)

***Bahasa Malaysia*** *Headnotes*

Ini adalah rayuan terhadap keputusan hakim bicara membenarkan tuntutan plaintif terhadap defendan-defendan berkenaan 75,075 saham-saham amanah dalam Sin Kean Boon Capital Sdn Bhd ('SKBC'). Plaintif dan defendan pertama adalah adik-beradik sementara defendan kedua adalah isteri defendan pertama. Defendan pertama adalah pemilik berdaftar 99% saham dalam SKBC dan plaintif adalah pemilik berdaftar 1% saham dalam SKBC. Defendan pertama dan plaintif kedua-duanya adalah pengarah SKBC. Walau bagaimanapun, plaintif diminta meletak jawatan sebagai pengarah dan defendan kedua dilantik sebagai pengarah menggantikannya. Pada 3 Disember 1994, satu amanah ('amanah tersebut') dibuat oleh Sin Kean

Boon bersama-sama dengan defendan pertama sebagai pemegang amanah asal tersebut untuk manfaat plaintif dan anak-anak plaintif. Selepas kematian Sin Kean Boon, defendan pertama menjadi pemegang amanah tunggal amanah tersebut. Amanah tersebut mengandungi 75,075 saham-saham biasa bernilai RM1.00 setiap satu dalam SKBC. Amanah itu sah untuk 20 tahun bermula dari 3 Disember 1994 sehingga 3 Disember 2014. Menurut syarat-syarat amanah tersebut, dana amanah tersebut adalah untuk manfaat benefisiari-benefisiari amanah tersebut iaitu plaintif dan anak-anak plaintif. Pada 30 November 2010, plaintif telah memfailkan tindakan terhadap defendan-defendan. Kemudiannya, pihak-pihak terlibat berunding dan guaman itu telah ditarik balik apabila pihak-pihak memasuki satu perjanjian penyelesaian. Jumlah RM1.38 juta telah dibayar kepada plaintif sebagai penyelesaian penuh dan muktamad pertikaian-pertikaian antara pihak-pihak berhubungan amanah tersebut dan guaman sivil tersebut. Di Mahkamah Tinggi, tuntutan plaintif terhadap defendan pertama adalah untuk pelanggaran kewajipan fidusiari sebagai pemegang amanah untuk amanah tersebut, khususnya, dalam mendapatkan manfaat tidak berpatutan daripada hasil yang sama. Tuntutan plaintif terhadap defendan kedua berdasarkan satu pelanggaran kewajipan fidusiari sebagai seorang pemegang amanah konstruktif untuk amanah tersebut. Mahkamah Tinggi mendapati bahawa (i) defendan pertama sebagai pemegang amanah tunggal untuk amanah tersebut telah melanggar kewajipan fidusiarinya sebagai pemegang amanah dan telah memperoleh pengkayaan tidak adil daripada amanah tersebut; (ii) perjanjian penyelesaian antara defendan pertama dan plaintif adalah tidak sah dan tidak boleh dikuatkuasakan atas alasan-alasan bahawa defendan pertama sebagai pemegang amanah tunggal amanah tersebut telah melaksanakan paksaan dan pengaruh tidak wajar dalam pentadbiran SKBC dan 70,075 saham-saham amanah; (iii) defendan pertama telah membuat misrepresentasi dalam kl.1(iii)(b) bahawa jumlah yang dinyatakan adalah jumlah dalam akaun-akaun yang telah diaudit SKBC untuk tahun 1995; (iv) perjanjian penyelesaian adalah tidak sah dan tidak boleh dikuatkuasakan; dan (v) defendan kedua bertanggungjawab sebagai pemegang amanah konstruktif berhubungan 75,075 saham-saham amanah SKBC. Tidak berpuas hati dengan keputusan Mahkamah Tinggi, defendan pertama dan kedua merayu.

A B C D E F G H I

**Diputuskan (menolak rayuan)**
**Oleh Badariah Samid HMR menyampaikan penghakiman mahkamah:**

**(1)** Plaintif dan defendan kedua telah memasuki satu perjanjian jual beli 75,075 saham SKBC yang merangkumi aset-aset dalam amanah tersebut di mana defendan pertama adalah pemegang amanah tunggal. Defendan pertama telah membeli 75,075 saham plaintif untuk RM1.5 juta, yang jauh di bawah nilai pasarannya. Menurut keterangan dokumentar, antara 8 Januari 1996 sehingga Ogos 1999, 6,319,943 jumlah saham dalam Kumpulan SKB yang dimiliki SKBC telah dijual oleh perayu pertama untuk jumlah RM29,531,146.20. Akibatnya, plaintif berhak atas hasil penjualan setakat 75,075 sahamnya. Tambahan lagi, 24.5% saham-saham SKBC dijual pada 1998. Ini adalah pelaburan utama untuk 75,075 saham amanah plaintif di SKBC. Plaintif tidak dimaklumkan berkenaan pelupusan ini. Defendan pertama telah memperuntukkan keseluruhan hasil pelupusan saham-saham tersebut dalam jumlah RM29,531,146.20. Defendan pertama tidak mendepositkan bahagian hasil plaintif daripada pelupusan tersebut dalam mana-mana akaun amanah. Oleh itu, defendan pertama telah melanggar kewajipan fidusiarinya sebagai pemegang amanah kepada amanah tersebut.

**(2)** Defendan pertama telah juga memperoleh pengkayaan tidak adil dalam bentuk hasil jualan daripada pelupusan bahagian saham-saham SKBC plaintif yang telah dikira oleh hakim bicara berjumlah RM9,567,621.70. Plaintif telah membawa tindakan ini terhadap pihak yang sesuai iaitu defendan pertama sebagai pemegang amanah tunggal untuk amanah tersebut dan kausa tindakan plaintif terhadap defendan pertama adalah untuk pelanggaran kewajipan fidusiari dan pengkayaan tidak adil dengan penyelewengan hasil daripada pelupusan 75,075 saham plaintif dalam SKBC. Oleh itu, hujahan defendan pertama bahawa dalam keadaan ini guaman yang sesuai adalah melalui cara tindakan derivatif dimulakan oleh SKBC adalah satu salah anggapan.

**(3)** Terdapat keterangan yang kukuh dan boleh dipercayai untuk menyokong dapatan-dapatan hakim bicara bahawa defendan pertama, yang berada dalam kedudukan dominan kepada plaintif, telah menggunakan pengaruh tidak wajar ke atas plaintif dalam menandatangani perjanjian penyelesaian. Tidak perlu dipertikaikan lagi bahawa defendan pertama sebagai pemegang amanah tunggal amanah tersebut mempunyai hubungan fidusiari dengan plaintif. Keadaan sekitar perjanjian penyelesaian adalah untuk meletakkan plaintif dalam keadaan yang merugikan. Plaintif tidak memahami kandungan perjanjian penyelesaian kerana ia tidak diperjelaskan kepadanya oleh SD3. Ini

telah diburukkan lagi oleh klausa yang agak luar biasa yang secara efektifnya telah menghalang plaintif daripada menerima manfaat nasihat undang-undang bebas. Berserta dengan ini adalah testimoni SD3 bahawa perjanjian penyelesaian disediakan sepenuhnya atas arahan defendan pertama. Oleh itu, dapatan hakim bicara bahawa terdapat pengaruh tidak wajar oleh defendan pertama untuk mendorong plaintif menandatangani perjanjian penyelesaian tidak bertentangan dan dengan jelas tidak salah sehingga mewajarkan campur tangan rayuan.

**(4)** Jumlah yang dihutang oleh defendan pertama adalah RM40,939,688 yang merangkumi hasil daripada jualan saham SKBC dalam Kumpulan SKB. Plaintif tidak dimaklumkan apabila dia menandatangani perjanjian jualan saham di mana harga jualan adalah RM1.5 juta. Plaintif juga tidak dimaklumkan bahawa defendan pertama telah diperuntukkan seluruh hasil transaksi jualan saham. Terdapat misrepresentasi oleh defendan pertama kepada plaintif berkenaan nilai sebenar saham-sahamnya. Jika plaintif mengetahui bahawa nilai sebenar saham-sahamnya adalah lebih daripada RM13 juta, tidak dapat difahami mengapa dia menerima jumlah kecil RM1,380,000 dalam perjanjian penyelesaian. Oleh itu, terdapat misrepresentasi oleh defendan pertama kepada plaintif yang telah menyebabkan plaintif menandatangani perjanjian penyelesaian. Transaksi jualan saham antara plaintif dan defendan pertama oleh itu tidak adil. Defendan pertama telah memberi pengaruh tidak wajar ke atas plaintif dan telah menggunakan kedudukannya sebagai pemegang amanah tunggal untuk amanah tersebut untuk memperkayakan dirinya dengan tidak adil. Oleh itu, perjanjian penyelesaian adalah tidak sah dan tidak boleh dikuatkuasakan.

**(5)** Defendan kedua adalah isteri kepada defendan pertama, iaitu pemegang amanah tunggal untuk amanah tersebut dan juga pemilik berdaftar 99% saham dalam SKBC. Defendan kedua mengakui bahawa pada setiap waktu material dia sedar bahawa 75,075 saham dalam SKBC adalah subjek amanah tersebut memihak pada plaintif dan anak-anak plaintif untuk 20 tahun. Keterangan daripada defendan pertama dan kedua adalah jumlah RM40,939,688 diambil daripada SKBC oleh defendan pertama sebagai pinjaman kepadanya sebagai pengarah SKBC. Jumlah ini merangkumi segala hasil jualan saham-saham SKBC, yang juga termasuk saham-saham amanah plaintif. Dalam testimoni mereka, defendan pertama dan kedua telah mendakwa bahawa RM40,903,577 telah dihapuskan sebagai 'hutang lapuk' atas nasihat ejen cukai, yang tidak dipanggil untuk mengesahkan keterangan penting ini. Dalam apa jua keadaan pun, s. 133 Akta Syarikat 1965 melarang syarikat daripada memberikan pinjaman kepada pengarah-pengarahnya. Oleh itu, pinjaman RM40,903,577 kepada defendan pertama bertentangan dengan seksyen tersebut.

**(6)** Sebagai pengarah SKBC, defendan kedua mempunyai akses kepada semua rekod-rekod SKBC serta pengetahuan bahawa pinjaman telah diberikan kepada defendan pertama, yang jumlahnya merangkumi bahagian plaintif sebanyak 75,075 saham-saham amanah. Oleh itu, defendan kedua adalah pemegang amanah konstruktif 75,075 saham amanah plaintif. Defendan kedua adalah fidusiari saham-saham SKBC yang termasuk saham-saham plaintif. Terdapat pelupusan bahagian hasil plaintif daripada jualan saham-saham amanah yang melanggar amanah dan ini telah diperoleh oleh kelakuan tidak berpatutan oleh defendan pertama dan kedua. Oleh itu, mahkamah ini mengesahkan keputusan hakim bicara berkenaan liabiliti defendan kedua sebagai pemegang amanah konstruktif kepada amanah tersebut.

**Legislation referred to:**
Companies Act 1965, s. 133
Contracts Act 1950, s. 16(1)

*For the appellant - SC Tan; M/s SC Tan*
*For the respondent - Mura Raju & K Govindaraju; M/s G Raju & Co*

*[Editor's note: Appeal from High Court, Pulau Pinang; Civil Suit No: 22NCVC-848-12-2012 (affirmed).]*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Badariah Sahamid JCA:**

### Introduction

**[1]** This is an appeal against the decision of the learned trial judge, delivered on 30 June 2016 after full trial, which allowed the plaintiff's claim against the defendants in respect of 75,075 trust shares in Sin Kean Boon Capital Sdn Bhd ('SKBC').

**[2]** For ease of reference, parties will be referred to as they were in proceedings before the High Court. The salient facts are derived from the learned trial judge's 'alasan penghakiman' with necessary modifications.

### Background Facts

**[3]** The plaintiff and the first defendant are brothers. The second defendant is the wife of the first defendant.

**[4]** The first defendant is the registered proprietor of 99% of the shares in SKBC. The plaintiff is the registered proprietor of the remaining 1% of the shares of SKBC. The first defendant and the plaintiff are the two directors of SKBC. However, on 1 April 2006, the plaintiff was asked to resign as director and the second defendant was appointed as director in his place.

**[5]** On 3 December 1994 a trust ('the said trust') was made by the late Sin Kean Boon together with the first defendant as original trustees of the said trust for the benefit of the plaintiff and the plaintiff's children. On the demise of Sin Kean Boon, the first defendant became the sole trustee of the said trust.

**[6]** The said trust consists of 75,075 ordinary shares of RM1 each in SKBC. At all material times, the issued share capital of SKBC consists of 231,000 ordinary shares at RM1 each. The total authorised share is 500,000 ordinary shares.

**[7]** The trust is valid for 20 years commencing from 3 December 1994 until 3 December 2014. The value of the said trust in the year 1995 was estimated to be at around RM10 million. In 1997, the value of the said trust was estimated at RM38,000,000. With the passage of time the value was expected to rise to at least RM50,000,000.

**[8]** According to the terms of the said trust, the funds of the said trust are for the benefit of the beneficiaries of the said trust ie, the plaintiff and the plaintiff's children.

**[9]** On 30 November 2010, the plaintiff had filed an action against the defendants in the Penang High Court in Civil Suit No. 22-811-2010. After appearance was entered, parties negotiated and the abovementioned suit was withdrawn when parties entered into a settlement agreement.

**[10]** The settlement agreement dated 25 March 2011 was entered into between the plaintiff and the first defendant. A sum of RM1.38 million was paid to the plaintiff in full and final settlement of disputes between the parties in respect of the said trust and the civil action in Civil Suit No. 22-811-2010.

**Plaintiff's Claim**

**[11]** The plaintiff's claim against the first defendant is primarily for breach of fiduciary duties as a trustee of the said trust, in particular in obtaining undue benefit from the proceeds of the same. The plaintiff's claim against the second defendant is premised on a breach of fiduciary duties as a constructive trustee of the said trust.

**Issues To Be Tried**

**[12]** The agreed issues to be tried before the High Court are as follows:

(i) Whether the first defendant as sole trustee of the 75,075 shares held by the first defendant has administered the said trust and obtained unjust enrichment from the said trust?

(ii) Whether there was pressure, coercion, undue influence and misrepresentation by the first defendant in the administration of SKBC and the plaintiff's 75,075 shares?

(iii) Whether the accounts of the said trust were prepared and given to the plaintiff?

(iv) Whether the settlement agreement is enforceable?

(v) Whether the second defendant was a constructive trustee of the plaintiff in respect of the plaintiff's 75,075 shares in SKBC from 23 March 2011?

**Findings And Decision Of The High Court**

**[13]** The findings and decision of the learned trial judge may be summarised as follows:

(i) The first defendant as sole trustee of the said trust for the benefit of the plaintiff and his children, had breached his fiduciary duties as trustee and had obtained unjust enrichment from the said trust.

(ii) The settlement agreement between the first defendant and the plaintiff was void and unenforceable on the grounds that the first defendant as sole trustee of the said trust had exercised coercion and undue influence in the administration of SKBC and the plaintiff's 75,075 trust shares.

(iii) The first defendant had made a misrepresentation in cl. 1(iii)(b) of the settlement agreement, that the amount stated therein was the amount in the audited accounts of SKBC for the year 1995.

(iv) The settlement agreement is void and unenforceable.

(v) The second defendant is liable as a constructive trustee in respect of the plaintiff's trust shares of 75,075 shares of SKBC.

**The First And Second Defendants' Grounds Of Appeal**

**[14]** In the memorandum of appeal, the first and second defendants' grounds of appeal may be summarised as follows.

**The First Defendant**

*Breach Of Trust*

**[15]** The learned trial judge had erred in law and in fact in her failure to appreciate the following:

(i) While the plaintiff's pleaded case is premised on the first defendant's breach of trust of 75,075 shares in SKBC of which the first defendant is trustee, Her Ladyship had relied on the loan to the first defendant and the disposal of 24.5% shares of SKB Group Bhd as evidence of the first defendant's breach of trust to the plaintiff.

(ii) The loan to the first defendant as well as the disposal of 24.5% equities of SKBC, if at all, were wrongs committed against SKBC. Thus, the proper party to sue is not the plaintiff but SKBC itself by way of a derivative action.

(iii) There is no evidence that the proceeds of sale of the 24.5% equities of the SKB Group of RM29,531,146.20 was appropriated by the first defendant. On the contrary, the annual returns and directors' report showed it was utilised to reduce the borrowings of SKBC.

*The Settlement Agreement*

**[16]** The learned trial judge had erred in law and fact when she set aside the settlement agreement between the first defendant and the plaintiff. The reasons are as follows:

(i) The relationship between the first defendant and the plaintiff's family was already bad.

(ii) The plaintiff understood the contents of the settlement agreement.

(iii) There was no misrepresentation in respect of cl. 1(iii)(b) of the settlement agreement on account of the failure to verify the amount of RM1,796,879.93 in the audited account of year 1995 of SKBC as this figure was not disputed by the plaintiff or the first defendant.

(iv) The learned trial judge had erred in her finding that the plaintiff was unaware that in 2011, the first defendant owed RM40,939,688 which comprise proceeds from the sale of shares of the SKB Group and in her conclusion that had the plaintiff known that the actual price of his shares was RM12 million, the plaintiff would not have sold his trust shares for RM1.5 million.

**The Second Defendant**

*Constructive Trustee*

**[17]** The learned trial judge had erred in law and in fact in finding the second defendant liable as a constructive trustee for the 75,075 shares in SKBC for the following reasons:

(i) The mere fact that the second defendant is a director of SKBC and has access to all records of SKBC and has knowledge of the loan to the first defendant is insufficient to make the second defendant liable as a constructive trustee of the said trust shares of the plaintiff.

(ii) After the second defendant became a director of SKBC, in 2012, the sum of RM40,903,577 was written off as "bad debts", as reflected in the audited account for 31 December 2012.

(iii) The proceeds of the disposal of the plaintiff's trust shares never reached the second defendant's hands.

**Our Judgment**

**[18]** On careful perusal of the appeal records, as well as the oral and written submissions of counsel, we are of the considered view that there was no error in the learned trial judge's findings of fact or law to warrant appellate intervention. We therefore affirmed the decision of the learned trial judge and dismissed the appeals of the first and second defendants/appellants with costs. The grounds of our decision are set out below.

**Claim Against The First Defendant**

*Breach Of Fiduciary Duty*

**[19]** In the trial judge's findings, the first defendant had breached his fiduciary duty of care as sole trustee to the said trust. In her 'alasan penghakiman', Her Ladyship had supported her findings by the following evidence.

**[20]** On 1 November 1999 the plaintiff and the second defendant had entered into a sale and purchase agreement in respect of the 75,075 shares of SKBC which comprise the assets in the said trust of which the first defendant was the sole trustee. The first defendant had purchased the plaintiff's 75,075 shares for RM1.5 million, which is far below its market value.

**[21]** According to documentary evidence, between 8 January 1996 to August 1999, a total of 6,319,943 shares in the SKB Group owned by SKBC was sold by the first appellant for a sum of RM29,531,146.20. As a result, thereof the plaintiff was entitled to the sale proceeds to the extent of his 75,075 shares. The plaintiff's share of the sale proceeds was calculated to be at RM9,597,621.70.

(RM29,531.20 divided by 231,000 shares = RM127.84

RM127.84 x 75,075 shares = RM9,597,621.70)

**[22]** In addition, from the documentary evidence of the accounts of SKBC for the year ending 31 December 1998, 24.5% of SKBC shares were sold in 1998. This was the main investment for the 75,075 trust shares of the plaintiff in SKBC. The first defendant had admitted in his testimony that the first plaintiff was not informed of this disposal. Neither did the first defendant show any accounts to the plaintiff in connection with the share sale which would have accumulated in the said trust from 1994 to 2014. The first defendant had appropriated the entire proceeds of the said disposal of shares in the sum of RM29,531,146.20.

**[23]** From the evidence, the learned trial judge found that the first defendant had not deposited the plaintiff's portion of the proceeds of the said disposal in any trust account. No explanation was given by the first defendant for his failure to do so.

**[24]** In his cross-examination, the first defendant had admitted that at the material time, the first defendant was in a dominant position as registered owner of 230,999 shares in SKBC (99%). Thus the first defendant had the opportunity to take advantage of his position as director of SKBC and sole trustee of the plaintiff's 75,075 trust shares to control and manage the affairs of SKBC to his advantage.

**[25]** The first defendant owned 99% shares in SKBC. The plaintiff, on the other hand, only owned one share in SKBC. The first defendant and the plaintiff were the only directors of SKBC. Thus, the plaintiff had acted as a mere "rubber stamp" to the first defendant in approving the "back dated" resolutions of SKBC.

**[26]** We have carefully considered the abovementioned supporting evidence referred to by the learned trial judge in arriving at the decision that the first defendant had breached his fiduciary duty as trustee to the said trust. The first defendant had also obtained an unjust enrichment in the form of sale proceeds from the disposal of the plaintiff's portion of SKBC shares which the learned trial judge calculated to be in the sum of RM9,597,621.70. We have no reason to depart from the trial judge's finding in this respect.

**[27]** We are also of the view that the first defendant is the proper party against which the plaintiff has brought this action as the first defendant is the sole trustee of the said trust (which comprise 75,075 shares in SKBC) and the plaintiff's cause of action against the first defendant is for a breach of fiduciary duty and unjust enrichment by the misappropriation of the proceeds of the disposal of the plaintiff's 75,075 shares in SKBC. Thus, the first defendant's contention that in the circumstances, the proper suit is by way of derivative action commenced by SKBC is misconceived.

*Undue Influence*

**[28]** Pursuant to the settlement agreement dated 25 March 2011 between the plaintiff and the first defendant, the plaintiff had received RM1,380,000 from the first defendant, purportedly as full and final settlement of disputes between the parties in respect of the trust shares.

**[29]** The findings of the learned High Court Judge were premised on the following evidence.

**[30]** The first defendant had admitted writing a letter to the plaintiff instructing the plaintiff to withdraw the civil suit against the defendant. The plaintiff was also directed by the first defendant to advise the plaintiff's solicitors accordingly.

**[31]** It is not disputed that the plaintiff's trust shares were in the sole control of the first defendant. The plaintiff had alleged that the first defendant had threatened to sever family relations, bankrupt the plaintiff and leave nothing for the plaintiff and his children after the trust comes to an end in 2014.

**[32]** The settlement agreement was prepared by SD3 (Daphne Choy Gaik Choo) a solicitor from the firm of Choy & Associates. In her testimony, the learned High Court Judge had made a finding that there was a material discrepancy between SD3's testimony in her examination-in-chief and in cross-examination in respect of what transpired when the plaintiff came to SD3's office to sign the settlement agreement on 25 March 2011.

**[33]** In her witness statement, SD3 had stated that she had given the plaintiff three copies of the settlement agreement and asked the plaintiff to read the same. SD3 then asked the plaintiff whether he understood the contents of the settlement agreement. On the plaintiff confirming that he understood the contents of the settlement agreement, SD3 had instructed the plaintiff to initial on every page of the settlement agreement. SD3 had confirmed that she did not explain to the plaintiff the contents of the settlement agreement. Neither did the plaintiff inform SD3 that he did not understand the contents of the settlement agreement.

**[34]** However, in cross-examination SD3 had stated that the plaintiff had read the contents of the settlement agreement aloud to SD3 and the plaintiff had stated he understood the contents of the settlement agreement before signing the same.

**[35]** The learned High Court Judge had made a finding that in the light of the material discrepancy in the abovementioned evidence and the absence of any explanation thereto, the evidence of SD3 that the plaintiff had understood the contents of the settlement agreement before he signed the same, was not credible.

**[36]** We find there was no error in the trial judge's evaluation of the reliability of the evidence of SD3 who was a material witness in respect of whether the plaintiff had understood the contents of the settlement agreement.

**[37]** It was not disputed that the plaintiff was not represented by any solicitors. SD3 had testified that she had prepared the settlement agreement on the instructions of the first defendant only. Before the settlement agreement was signed on 25 March 2011, SD3 had never met or communicated with the plaintiff. On the same date, the settlement agreement had been finalised and was ready to be signed by the plaintiff.

**[38]** In addition, the learned High Court Judge had referred to cl. 3 of the settlement agreement, which as he found to be as unreasonable as it did not reflect what actually had transpired. The said cl. 3 provides as follows:

> 3. The 1st Party confirms that he understands the contents of the Agreement herein and elects to not appoint his own independent legal adviser or solicitors to advise him on this agreement.
>
> ('The 1st Party' refers to the Plaintiff)

**[39]** What is meant by 'undue influence'? According to s. 16(1) of the Contracts Act 1950:

> 16(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
>
> (2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another:
>
> (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or
>
> (b) …

**[40]** We are of the considered view that from the above evidence before the trial court, there was credible and cogent evidence to support the learned trial judge's findings that the first defendant who was in a dominant position to the plaintiff, had exerted undue influence on the plaintiff in signing the settlement agreement. The first defendant, being the sole trustee of the said trust was indisputably in a fiduciary relation to the plaintiff. In addition, the circumstances surrounding the settlement agreement were such as to place the plaintiff at a disadvantage. The plaintiff had not understood the contents of the settlement agreement as the same was not explained to him by SD3. This was exacerbated by a most unusual clause (cl. 3 abovementioned) which effectively precluded the plaintiff from the benefit of independent legal advice. Coupled with this was SD3's testimony that the settlement agreement was prepared entirely on the instructions of the first defendant.

**[41]** Given the above circumstances, the learned trial judge's finding that there was undue influence emanating from the first defendant to induce the plaintiff to sign the settlement agreement was neither perverse nor plainly wrong so as to warrant our appellate intervention.

*Misrepresentation*

**[42]** The learned trial judge had also made a finding that the first defendant had made a representation in cl. 1(iii)(b) of the settlement agreement, which provides as follows:

> 1. The 1st Party of the one part and the 2nd Party of the other part hereby agree that the abovementioned Dispute between the parties is settled on terms as follows:
>
> (i) …
>
> (ii) …
>
> (iii) the 1st party agrees upon receipt of the settlement sum to do the following:
>
> (a) …
>
> (b) To make no further claims whatsoever and/or however in respect of and/or arising from the trust dated 3 December 1994, the Share Sale Agreement of 1 November 1999 between the parties, and the shares held by the 1st Party in SKB Capital including **the amount of RM1,796,879.93 which was the sum stated as due to the 1st Party since 1995 in SKB Capital's audited accounts**; (emphasis added)

**[43]** It was the finding of the learned trial judge that there was a misrepresentation that the amount above-stated was the amount in the audited accounts of SKBC for the year 1995, when SD3 had not referred to the relevant audited account, but merely stated the abovementioned figure on the instructions of the first defendant.

**[44]** The learned High Court Judge had referred to the documentary evidence of the audited accounts of SKBC for the years 1995 to 1999, 2008 and 2011. The audited accounts showed the amounts stipulated as being loans to a director. In his cross-examination, the first defendant had admitted that the 'director' referred to was the first defendant himself.

**[45]** The learned trial judge had considered the evidence that in 2011, the amount owing by the first defendant was RM40,939,688 which comprise the proceeds of the share sale of SKBC in the SKB Group. The plaintiff was not informed when he signed the share sale agreement on 1 November 1999 where the sale price was RM1.5 million. Neither was the plaintiff informed

that the first defendant had appropriated the entire proceeds of the share sale transaction. Had the plaintiff been made aware that the value of his share was RM13,305,398 million, the plaintiff would not have sold his shares to the first defendant for a meagre RM1.5 million.

(RM40,939,688 divided by 231,000 = RM177

RM177 x 75,057 shares = RM13,305,398)

**[46]** It is our considered view that the learned trial judge had properly referred to the audited accounts as well as the testimony of SD3 in order to arrive at the finding that there was a misrepresentation by the first defendant to the plaintiff on the true value of his shares. We also agreed with the trial judge's observation that had the plaintiff known that the true value of his shares was in excess of RM13 million, it is inconceivable that he would have agreed to accept the paltry sum of RM1,380,000 in the settlement agreement. Thus there was a misrepresentation by the first defendant to the plaintiff that had induced the plaintiff to sign the settlement agreement.

**[47]** Premised on the above, the learned trial judge made a finding that the share sale transaction between the plaintiff and the first defendant was unjust. The first defendant had exerted undue influence on the plaintiff and utilised his position as the sole trustee of the said trust to unjustly enrich himself. Thus, the settlement agreement is void and unenforceable as the same was signed by the plaintiff as a consequence of undue influence and misrepresentation perpetrated by the first defendant upon the plaintiff.

**[48]** On evaluation of the abovementioned evidence, we find no reason to depart from the abovementioned findings of the learned trial judge.

**Claim Against The Second Defendant**

*Constructive Trustee*

**[49]** The learned trial judge had found the second defendant liable as a constructive trustee of the plaintiff's 75,075 trust shares in SKBC. The findings of the learned trial judge was premised on the following evidence.

**[50]** The second defendant was the wife of the first defendant, who was the sole trustee of the said trust as well as the registered proprietor of 99% of the shares of SKBC. The second defendant admitted that at all material times, she was aware that 75,075 shares in SKBC were the subject of the said trust in favour of the plaintiff and his children for 20 years.

**[51]** In her evidence, the wife of first defendant (see para 3) had admitted that the sum of RM150,000 that was paid to the plaintiff as part payment for the settlement agreement dated 23 March 2011, came from the joint account of the first and second defendants.

**[52]** The evidence from the first and second defendants were that a sum of RM40,939,688 was taken out of SKBC by the first defendant as a loan to himself as a director of SKBC. This sum comprises the entire proceeds of the sale of SKBC's shares in the SKB Group. It is to be noted that this sum included the plaintiff's trust shares of 75,075 shares in SKBC.

**[53]** In addition, the learned trial judge had found that the documentary evidence of the audited accounts for the year ending 31 December 2012 showed that the exact sum of RM40,903,577 had been written off as "bad debts". At that time, the second defendant had already been appointed as a director of SKBC to replace the plaintiff. In her cross-examination, the second defendant had admitted knowledge of this.

**[54]** The learned trial judge had also found that in their testimonies, the first and second defendants had alleged that the RM40,903,577 had been written off as "bad debts" on the advice of their tax agent. However, the said tax agent was never called to confirm this piece of crucial evidence.

**[55]** In any event, s. 133 of the Companies Act 1965 prohibits a company from giving loans to its directors. Thus, the loan of RM40,903,577 to the first defendant was in contravention of the abovementioned section.

**[56]** As a director of SKBC from her appointment to the position on 1 April 2006 the second defendant had access to all the records of SKBC as well as knowledge of the loan to the first defendant, the amount of which comprised the plaintiff's portion of 75,075 trust shares. Thus the second defendant is a constructive trustee of the 75,075 trust shares of the plaintiff in SKBC from 26 March 2011.

**[57]** Constructive Trusts are imposed by the court as a result of the conduct of the trustee. While English law provides there is no clear and all-embracing definition of a constructive trustee, the concept has been developed in circumstances that it would be unconscionable to deny the beneficial interest of a party. Be that as it may:

> All the commentators accept that the following three situations give rise to the imposition of a constructive Trust: first, where advantages have been obtained by fiduciaries breaching their duty of loyalty, secondly, where there has been a disposition of trust property in breach of trust, and, thirdly, where advantages have been obtained by fraudulent or unconscionable conduct.
>
> (*Parker & Mellows, The Modern Law of Trusts*, 8th Edn, London Sweet & Maxwell 2003 at p. 313.)

**[58]** The learned trial judge had made findings that the second defendant who was a director of SKBC was a fiduciary of SKBC shares which includes the plaintiff's 75,075 shares. There has been a disposition of the plaintiff's share of the proceeds of sale of the trust shares in breach of trust and this was obtained by the unconscionable conduct of the first and second defendants. Thus, we find no reason to depart from the trial judge's findings of fact or of law. We therefore affirmed the decision of the learned trial judge in respect of the liability of the second defendant as a constructive trustee to the said trust.

**[59]** For all the reasons stated above, we had affirmed the decision of the learned trial judge in respect of the first and second defendants/appellants and we had dismissed both the first and second defendants' appeals with costs subject to allocatur fees and we had also ordered that deposit to be refunded to the appellants.